

## Emergency relief in arbitration

By Gordon P. Katz



A dispute has arisen that cannot be settled. You turn to the parties' contract and discover that all disputes are to be resolved by arbitration.

You next file on behalf of your client a demand for arbitration. But what if you need preliminary relief — maybe an injunction, maybe security? What do you do?

There is an answer. You may seek emergency relief through either the arbitral authority — for example, the American Arbitration Association, if that is the parties' chosen arbitral forum — or you can go directly to court for emergency relief. In short, you have options.

Rules of the AAA permit an arbitrator to make interim awards (Rule 37, AAA Commercial Rules) and provide a valuable and efficient procedure for a party to an arbitration agreement to obtain "emergency measures of protection." (Rule 38, AAA Commercial Rules).

If you are governed by the AAA rules, Rule 38 is particularly useful. It provides that a party has the opportunity to obtain emergency relief within days. According to AAA Rule 38(a) and (b), when a party in need of emergency relief notifies the AAA of the nature of, and reasons for, such requested relief, "the AAA shall appoint ... within one day of receipt ... a single emergency arbitrator designated for rule on emergency applications."

The emergency arbitrator is required to disclose immediately any circumstance likely to impact his impartiality. The appointment and circumstances, if any, are then communicated to the parties, who have one day following receipt to challenge the appointment of the emergency arbitrator. AAA Rule 38(c).

No later than two business days after appointment, the AAA emergency arbitrator must establish a schedule for consideration of the application for emergency relief. The schedule must provide a reasonable opportunity for all parties to be heard, but it need not be in person. Telephone or video conferences, or written

submissions, are permitted. AAA Rule 38(d).

If the emergency arbitrator is satisfied that the absence of emergency relief would result in immediate irreparable law, and that the moving party is entitled to relief, the emergency arbitrator may enter an interim order or award granting the relief but must state the reasons for the order or award. AAA Rule 38(e).

JAMS provides a similar emergency relief procedure in its Rule 2(c). Indeed, the specific provisions of JAMS rules are virtually identical to those of the AAA.

While emergency arbitration proceedings are still relatively new, their use is growing.

In addition to emergency arbitral relief, there is usually an available judicial path for emergency relief, even when the parties' contract specifies that all disputes must be resolved via arbitration. Commercial, employment and other contracts often provide that, while all disputes must be submitted to arbitration, parties may still seek injunctive relief in court in order to obtain relief needed quickly. Indeed, even where such a clause is absent, courts often retain power to grant an interim preliminary injunction, where justified, for the time needed to get the case to arbitration. See *Next Step Med. v. Johnson & Johnson, Int'l*, 619 F. 3d 67, 70 (1st Cir. 2010). See also *Gold v. Maurer*, 251 F. Supp. 3d 127, 137 (D.D.C. 2017).

Which option to choose: emergency arbitration or judicial intervention? There are reasons favoring both. If you go to court to seek preliminary relief, there are appellate guardrails if the lower court makes a legal or significant factual error.

However, if speed and a decision-maker's focused attention are more important in the particular circumstances of your case, your client may be better off seeking emergency relief via arbitration. As noted above, AAA and JAMS rules require that those bodies act within days to process an emergency application.

While speed of resolution may also be found

in court, there is no guarantee that a busy clerk or judge, particularly one who also manages a criminal docket, will allocate the time for your matter. And even if the court elevates your emergency motion to the top of its docket, the case has a greater likelihood of being bogged down in procedural issues and appellate review than does the same matter submitted to an emergency arbitrator.

Should you choose emergency arbitration, the courts will still be open to confirm an emergency arbitration award and thereby give your client a forum with teeth — i.e., a place to seek contempt if the award or order, once confirmed, is disobeyed. "An arbitrator has the power to grant preliminary injunctive relief, and district courts have the power to confirm and enforce such awards of equitable relief." *Bowers v. Northern Two Cayes Company Limited*, 2016 WL 3647339 at p. 2 (W.D.N.C. Cir. 2016).

Recent court cases demonstrate the efficiency of first seeking emergency arbitral relief and then judicial enforcement of the arbitrator's order. In *Zurich American Ins. v. Trendsetter HR, LLC*, 2016 WL 4453694 (N.D. Ill. 2016), for example, the court confirmed a pre-judgment security award ordered by an AAA arbitrator of approximately \$4.5 million.

In other cases, courts have confirmed emergency arbitration orders enjoining violations of confidentiality and non-compete provisions contained in a consulting agreement. See *Johnson v. Dentsply Sirona, Inc.*, 2017 WL 4295420 (N.D. Okla. 2017).

And in a notable tech case, *Yahoo Inc. v. Microsoft Corp.*, 983 F. Supp. 2d 310 (S.D.N.Y. 2013), the court upheld an emergency arbitral decision ordering Yahoo to continue its contractual performance during the pendency of the parties' dispute resolution.

While emergency arbitration proceedings are still relatively new, their use is growing. Accordingly, the possibility of emergency arbitration proceedings, and all that such proceedings entail, are yet additional factors to be added to the calculus when parties decide whether or not to include an arbitration clause in their contract.

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